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NO. 82-1253

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HERMAN S. SOLEM, WARDEN
SOUTH DAKOTA STATE PENITENTIARY;
and
MARK V. MEIERHENRY, ATTORNEY GENERAL,
STATE OF SOUTH DAKOTA,

Petitioners,

v.

JOHN BARTLETT,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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I. Neither the Nature of the Land and the People Within the Area Affected by the 1908 Act nor the Effect a Decision will have on the Tribe and State Supports a Finding of Continued Reservation Status.

A. The acreage and population figures for the area in question support a finding of diminishment.

The Act of May 29, 1908, 35 Stat. 460, was implemented by the opening of surplus lands to settlement on May 1, 1910. 40 Interior Dec. 56 (1910); Presidential Proclamation of August 19, 1909, 36 Stat. 2500. Of the roughly 1.6 million acres comprising the portion of the original Cheyenne River Reservation effected by the 1908 Act, some 520,000 acres were allotted to Indians by 1925. An additional 14,000 acres were reserved for agency, school, and mission purposes. Nearly 1.1 million acres was available for disposal to non-Indians. Of the nearly 1.1 million acres available for disposal to the State and non-Indian settlers, over 917,000 acres, or 85 percent, was finally disposed of, as detailed below.

By 1925, some 93,000 acres of this land had been granted to the state, 1,000 acres had been set aside for townsites, 192,000 acres had been sold directly, and 765,000 acres had been entered by homesteaders. Only 28,000 acres remained vacant and unentered. Sioux Tribe of Indians v. United States, 105 Ct.Cl. 725, 752, vacated on other grounds, 329 U.S. 685 (1946), judgment re-entered, 78 F. Supp. 793, 112 Ct.Cl. 50 (1948), cert. denied, 337 U.S. 908 (1949).

After 1925, the number of acres of vacant land increased, presumably through the inability of some settlers to perfect their homestead entries. Following the passage of the Indian Reorganization Act in 1934, 25 U.S.C. §§ 461 et seq., some 161,000 acres of unsold lands were restored to tribal ownership and reservation status by the Secretary

of Interior.[1] H.R. Rep. No. 2503, 82nd Cong., 1st Sess. at 65 (1952). There are virtually no remaining unrestored surplus lands.

The speculative assertions of the United States that "relatively few entries were perfected" and "the Tribe's title to most of the opened land survived," are thus incorrect. Br. U.S. 26, 27 n. 31. The affected area today contains a substantial non-Indian population and a substantial proportion of non-Indian owned lands.[2] It also includes

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[1] Nearly all of this acreage was restored in 1941, 1949, and 1952. See, 6 Fed. Reg. 3300; 14 Fed. Reg. 471; 17 Fed. Reg. 1065. The subsequent restorations involved less than 300 acres, all in townsite lots. See, 22 Fed. Reg. 3693; 30 Fed. Reg. 15588; 32 Fed. Reg. 14276.

[2] The population of the area in question is about half Indian and half non-Indian. Br. Respondent 4; Br. Cheyenne River Sioux Tribe 22. However, the population of the Town of Eagle Butte is only 46.4 percent Indian.

the county seats of both Dewey and Ziebach Counties.

B. The effect of a decision in this matter on the Tribe and the State.

The State questions neither the Indian country status of tribal land restored

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U.S. Department of Commerce, 1980 Census of Population and Housing - Advance Reports: South Dakota 8 (1981). The racial makeup of the affected area stands in contrast to that of the unaffected area, which is about 84 percent Indian. U.S. Department of Commerce, 1980 Census of Population, v. 1, ch. B, "General Characteristics," pt. 43 at 132, 140 (1982). Furthermore, the population in the area affected by the 1908 Act in the original Standing Rock Reservation is about 75 percent non-Indian, with comparable figures with respect to the land.

Precise figures as to the proportional land ownership of Indians and non-Indians are unavailable. However, the assertion that "almost half" of the area is Indian-owned is exaggerated. See, Br. U.S. at 27 n.31. Today, about two-thirds of the land affected by the 1908 Act is owned by non-Indians. See, U.S. Department of Interior, Land Ownership Maps of Cheyenne River Reservation, Segments A-G, K-R, X-Z, AA-CC, EE (available at Aberdeen Area Office, Aberdeen, South Dakota).

to reservation status by the Secretary of the Interior since 1934, nor the Indian country status of allotments still held in trust for individual Indians. Regardless of the outcome of this case, these lands, where most of the tribal population resides, will remain within tribal and federal jurisdiction. See, DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975). This jurisdictional dispute therefore principally concerns non-Indian lands within the opened area.

1. The effect on the Tribe is relatively small.

Because the Indian population in the area is concentrated on Indian lands, the effect on the Cheyenne River Sioux Tribe of a decision in favor of the State will be relatively small. The Tribe and the federal government would continue to have governmental authority over tribal members on Indian lands, and the State would generally

lack such jurisdiction. Such a decision would by no means produce the "parade of horribles" imagined by the Tribes.

The Tribes have suggested that a finding of diminished reservation boundaries will result in the sudden placement of unsuspecting Indians within an alien jurisdiction. Br. Cheyenne River Sioux Tribe 22-23, 24-25. This suggestion is not founded in the jurisdictional realities of the situation. First, the jurisdiction of the State would extend only to Indians outside the considerable portion of the affected area conceded to be Indian country. Second, the State had continuously exercised jurisdiction over the opened lands for over sixty years, until the decision in United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973). United States v. Dupris, 612 F.2d 319, 338-39 (8th Cir. 1979) (McMillian, J., dissenting), vacated, 446 U.S. 980 (1980). This exercise

was based on explicit holdings of diminishment and included crimes involving Indian defendants and Indian victims. See Lafferty ex rel. State v. Jameson, 80 S.D. 411, 125 N.W.2d 171 (1963); State v. Sauter, 48 S.D. 409, 205 N.W. 25 (1925).

Additionally, the state system of jurisprudence cannot be characterized as foreign to tribal culture, because the Tribe has for many years operated a Court based on the Anglo-American model. See, Code of Offenses, Cheyenne River Sioux Tribal Court. The tribal members have also always been subject to the jurisdiction of the federal courts for "major crimes" within Indian country. See, 18 U.S.C. § 1153. Furthermore, state law is specifically made applicable to tribal members in certain instances. See, 18 U.S.C. § 1152; 18 U.S.C. § 13. Finally, tribal members, like all other citizens of the state, participate fully in its political

process. See, Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 615-16 n.48 (1977).

2. The decision in the matter poses serious consequences to the State.

While the State recognizes the special position of Indians and Indian reservations under federal law, the State also has a legitimate concern that the uniform application of its laws not be unduly disrupted by conflicting authority in areas which, by congressional enactment, were settled by non-Indians in the same manner as nearly all other regions in the state, which have consequently attained a strongly non-Indian character, and which have not been regarded as reservation territory for several decades. If the area is declared to be part of the existing reservation, then neither the Tribe nor the State will have jurisdiction over non-Indians committing crimes against Indians

or Indian property. Such persons are instead subject only to federal prosecution. See, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); Williams v. United States, 327 U.S. 711 (1946). Hence, for this class of offenses, local residents would have to rely on federal law enforcement officials and distant offices of United States Attorneys, rather than local authorities, to bring offenders to justice. Because federal officials frequently have more pressing demands on their time and resources, many such crimes may go unpunished if the area is determined to have reservation status.

Additionally, although the Tribes attempt to play down the degree of tribal civil and regulatory authority over non-Indians or land owned by non-Indians within the Reservation, this is an important consideration. The standards announced in Montana

v. United States, 450 U.S. 544, 565-66 (1981), have been read to permit a wide range of tribal regulation and taxation of non-Indians on non-Indian lands.[3]

Non-Indians must also resort to tribal courts rather than state courts to litigate claims against Indians arising on non-Indian lands within reservation boundaries. See, Williams v. Lee, 358 U.S. 217 (1959); Kain v. Wilson, 83 S.D. 482, 161 N.W.2d 704 (1968). Because non-Indians cannot participate in the tribal political process, and recourse for violation of their rights is strictly limited,

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[3] See, Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982), cert. denied, 103 S.Ct. 293 (1983) (building, health, and safety regulations); Knight v. Shoshone and Arapahoe Indian Tribes, 670 F.2d 900 (10th Cir. 1982) (zoning regulations); Snow v. Quinault Indian Nation, 709 F.2d 1319 (9th Cir. 1983) (licensing and taxation). The Cheyenne River Sioux Tribe is no exception. It has in the past, and continues to assert, in varying degress, civil and criminal jurisdiction over non-Indians, especially in the area in question.

there exists a serious potential for discriminatory exercise of tribal authority. See generally, Dry Creek Lodge v. Araphoe and Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980), cert. denied, 449 U.S. 1118 (1981); Schantz v. White Lightning, 502 F.2d 67 (8th Cir. 1974).

II. The Intent of the 1908 Surplus Lands Act was to Diminish the Boundaries of the Original Cheyenne River Reservation.

A. The face of the Act demonstrates an intent to diminish.

1. "Sell and Dispose"

Bartlett notes the superficial similarities between the "sell and dispose" language in section 1 of the Act and the language used in the statutes construed in Mattz v. Arnett, 412 U.S. 481 (1973), and Seymour v. Superintendent, 368 U.S. 351 (1962). He fails, however, to note the identity of language in the 1908 Act and the 1907 and 1910 Rosebud Acts, which were construed more recently in

Rosebud Sioux Tribe, supra. The opening of Indian reservations by selling and disposing of a "portion of the reservation" can result in diminished boundaries, especially where an intent to disestablish is further evidenced elsewhere in the Act, in its legislative history, or in the circumstances surrounding its passage. Rosebud Sioux Tribe, 430 U.S. at 586-87. In Rosebud Sioux Tribe, these factors showed that the "sell and dispose" language in the 1907 and 1910 Rosebud Acts was intended to have the same effect as the language of cession in the 1904 Rosebud Act and the 1891 Lake Traverse Act interpreted in DeCoteau v. District County Court, 420 U.S. 425 (1975).[4]

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[4] Similar language was used in a 1910 statute diminishing the boundaries of the Pine Ridge Reservation in South Dakota, and an 1890 Act diminishing the boundaries of the Round Valley Reservation in California. See

2. "Reservation thus Diminished"

Section 2 of the 1908 Act explicitly refers to the two reservations as "the reservations thus diminished." This section does not refer to "the Indian lands thus diminished," but to the diminished "reservation." This phrase is unambiguous; its only possible meaning is that the reservations were to be diminished in size and their boundaries thereby constituted. The reservation was diminished by removing a discrete portion--the opened lands--and thereby contracting its boundaries.[5]

Russ v. Wilkins, 624 F.2d 914 (9th Cir. 1980), cert. denied, 451 U.S. 908 (1981); United States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977).

[5] This construction comports with the usual meaning of the word "diminish" in this context. See § 1, Act of May 30, 1910, 36 Stat.

Bartlett recognizes that subsequent Congressional and Administrative references to the "diminished reservation" described the portion of the original reservation not affected by the 1908 Act. If the word "diminished" referred to a reduction in Indian land ownership, as Bartlett argues, then the opened area, where such a reduction took place--and not the unopened area--would be the "diminished" portion. The dichotomy drawn by Congress and the Executive Branch between the "opened lands" and the "diminished reservation" clearly demonstrates that the 1908 Act was intended to reduce the boundaries of the Cheyenne River and Standing Rock Reservations.

448; Act of May 27, 1910, 36 Stat. 440; Rosebud Sioux Tribe, 430 U.S. at 585, 587, 588, 592, 594, 597, 598, 602, 611, and 614; DeCoteau v. District County Court, 420 U.S. 425, 447 (1975); Seymour v. Superintendent, 368 U.S. 351, 354 (1962); United States v. Pelican, 232 U.S. 442, 445, 449 (1914).

The legislative history of the 1908 Act confirms this construction of the word "diminished" in section 2. In his councils with the Indians regarding the proposed opening, Inspector James McLaughlin repeatedly uses the word "diminished" in conjunction with the redrawing of reservation boundaries. For example, at the Cheyenne River Agency, McLaughlin related his belief that the legislation would create "a permanent diminished reservation" "within the lines I have suggested," as opposed to opening all of the surplus lands. Pet. Br. App. A142-A144. At Standing Rock, McLaughlin specifically discussed section 2, explaining that those receiving allotments in "the portion to be ceded" could relinquish their original allotments and instead "come within the diminished reservation." Pet. Br. App. A87-A88.

McLaughlin was equally explicit in his Report to Congress, which was adopted as a

part of both the House and Senate Committee Reports. For example, McLaughlin spoke of "compact diminished reservations" with their own "outboundaries" separating the previously adjoining reservations. Pet. Br. App. A47. In his Report, McLaughlin also described drawing lines on a map of South Dakota "[i]n order that the Indians might fully understand the boundaries of the proposed diminished reservation." Pet. Br. App. A39.

In their reports, the congressional committees also referred to the "lands reserved for the use of the Indians upon both reservations as diminished." Pet. Br. App. A28. The acreage given for these lands is the acreage of the unopened areas. This clearly indicates that the unopened areas comprised the "reservation as diminished." In addition, the reports also speak of the "reduced reservations." Pet. Br. App. A29. A "reduction" of a reservation signifies an

alteration of boundaries. Russ v. Wilkins, 624 F.2d 914, 922 (9th Cir. 1980), cert. denied, 451 U.S. 908 (1981).

Bartlett also contends that the word "diminished" refers not to "reservations" but to "lands reserved for the use of the Indians," and that the diminished lands included Indian lands in the opened area as well as lands in the closed area. This reading ignores the acreage figures discussed above. The original area of the Cheyenne River Reservation was calculated as 2,874,811 acres. Subtracting the 1,728,000 acres which the reports state were affected by the 1908 Act leaves approximately 1,150,000 acres. This is the acreage given for the reserved lands referred to in the phrase "reservation as diminished." This figure for the reserved lands, however, does not account for any lands in the opened area. Thus, the word

"diminished" clearly is used to describe the reduced size of the reservation, not the reduced acreage of Indian lands throughout the original reservation. See, United States v. A Juvenile, 453 F.Supp. 1171, 1190 (D.S.D 1978).

3. "Public Domain"

The fact that the land might not have been "public lands" in the strict technical sense does not detract from the fact that the use of the term "public domain" in the 1908 Act reflects the intent of Congress. Because "public domain" and "Indian reservation" are mutually exclusive terms, Congress' use of the term clearly reflects an intent to exclude the opened area from the Reservation. See, DeCoteau, 420 U.S. at 446; Seymour, 368 U.S. at 358; Ute Indian Tribe v. Utah, 716 F.2d 1298, 1305 (10th Cir. 1983).

In Rosebud Sioux Tribe, for example, an argument similar to Bartlett's was made with

respect to the use of cession language by Congress in 1904 Rosebud Act. Strictly speaking, the 1904 Act was not a bilateral cession. Nevertheless, the Court held that the use of such language indicated an intent to diminish the reservation boundaries:

> The use of the word "cession" in the 1904 Act, which was not consented to by the required extraordinary majority of the Tribe, does not make the meaning of the Act ambiguous as between diminution of the reservation boundaries on the one hand, and merely opening up designated lands for settlement by non-Indians, on the other. The word is technically misused, but the meaning is quite clear.

Rosebud Sioux Tribe, 430 U.S. at 597.

The fact that some special provisions for entry were made in the 1908 Act does not mean that Congress intended the opened lands to continue as part of the Reservation. Whether opened lands actually became "public lands," subject, without restriction, to all public lands laws, is "logically separate from a question of disestablishment."

Rosebud Sioux Tribe, 430 U.S. at 601 n.24. Thus, where Congress has unequivocally described its intent by the use of "public domain" language, limitations placed on the entry of the lands are not relevant.[6]

4. School Lands

Bartlett argues that the school lands provision contained in section 7 of the 1908 Act is not indicative of an intent to diminish the boundaries of the original Cheyenne River Reservation. He states that this section was simply a separate present grant of lands rather than an implementation of the State's Enabling Act. A similar argument was rejected by this Court with respect to identical provisions contained in the 1910 Rosebud Act. Rosebud Sioux Tribe, 430 U.S.

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[6] In DeCoteau, the Court described the cession statute in question as a restoration to the public domain even though the statute expressly provided that entry would be allowed only under some of the public land laws. DeCoteau, 420 U.S. at 446.

at 599-601. Although Congress had the power to make such grants within existing reservation boundaries, the legislative history "demonstrates that Congress 'included the provision to implement the grant in the enabling act and for no other reason'." Rosebud Sioux Tribe, 430 U.S. at 600. See also, 42 Cong. Rec. 4753-4755 (April 15, 1908).

The House Report of the 1908 Act explicitly stated that the school lands provision was "in accordance with the enabling acts of these States." Pet. Br. App. A26. Furthermore, Congressman Hall explained the school lands provision in the Act as follows:

> I will say that the enabling act . . . provided for the granting in presenti of sections 16 and 36 for school purposes, and then it provided that in the case of the Indian reservations that grant of these sections for school purposes should be held in abeyance until the reservation was opened.

42 Cong. Rec. 4755 (April 15, 1908). The opening in the 1908 Act was clearly perceived as an extinguishment of the reservations within the meaning of the Enabling Act.

5. The Liquor Prohibition

The 1910 amendment to the 1908 Act contained a provision extending the federal Indian liquor prohibition over the opened lands. Despite the fact that the Court in Rosebud Sioux Tribe accorded considerable significance to an identical provision in the 1910 Rosebud Act, Bartlett argues that the presence of such a provision is entirely consistent with continued reservation status and consequently is irrevelant to the question of diminishment.

However, as this Court explained, when Congress was considering the Rosebud and Cheyenne River liquor prohibition extensions in early 1910, it was specifically acting

under its authority, as approved in Dick v. United States, 208 U.S. 340 (1908), to extend federal liquor laws into former reservation areas which had been disestablished and had thus otherwise passed from federal control. See, Rosebud Sioux Tribe, 430 U.S. at 614 n. 47; see also, H.R. Doc. No. 711, 61st Cong., 2nd Sess. (1910).

B. The legislative history and surrounding circumstances support a finding of diminished boundaries for the original reservation.

1. The Historical Setting

The 1908 Act must be viewed in historical context. In South Dakota, that historical context includes the 1904, 1907 , and 1910 Rosebud Acts and the 1910 Pine Ridge Act. All of these Acts diminished the size of the respective reservations. All of these Acts accomplished the same ends: the opening of surplus lands for disposal to homesteaders with payment to be made to the Indians from

the proceeds of the sales. This is not suprising, in that the Acts all had the same beginning, namely section 5 of the General Allotment Act of 1887, 24 Stat. 388.[7] The 1889 Act cited in Rosebud Sioux Tribe, which incorporated section 5 and delineated the boundaries of the original Rosebud Reservation, also delineated the boundaries of the original Cheyenne River Reservation and original Pine Ridge Reservation. As a result, all subsequent negotiations on each reservation were conducted pursuant to the baseline reflected by section 5 of the General Allotment Act.

The language of these Acts is nearly identical, save for the fact that the earliest Rosebud Act incorporated cession language from an earlier agreement which it

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[7] The importance of section 5 of the General Allotment Act is discussed in DeCoteau, 420 U.S. at 432, and Rosebud Sioux Tribe, 430 U.S. at 589-590 n. 6.

unilaterally modified to provide for the delayed payment scheme common to all the Acts. Rosebud Sioux Tribe, 430 U.S. at 592-98. These Acts affected reservations in the same region, had the same Senate sponsor and were presented to the tribes by the same federal official. The legislative debates on the 1910 Rosebud Act are replete with statements likening the 1910 Act to the 1908 Act in question, and making it clear that the similar South Dakota Surplus Lands Act were understood to have the same effect. See Appendix, Rosebud Sioux Tribe, supra, Vol. III, pp. 996, 1064-1065, 1068-1069, 1079-1080, 1083, 1095, 1109-1110, 1122 (Rosebud Acts expressly discussed as precedent that "was being followed" in the 1908 Act).[8] The

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[8] In fact, prior to his councils at Cheyenne River and Standing Rock, Inspector McLaughlin was instructed generally to follow the instructions given him with respect to the 1907 Rosebud Act. Juvenile, 453 F.Supp. at 1178.

Acts must therefore be viewed as part of a unified legislative program of diminishing reservations in South Dakota.

Despite this, Bartlett asks the Court to reach the improbable conclusion that Congress meant one thing in 1907 and 1910 with respect to the Rosebud and Pine Ridge Reservations, but meant something entirely different when it used precisely the same words in 1908 with respect to the Cheyenne River and Standing Rock Reservations.

In making this claim, Bartlett emphasizes the fact that this Court relied in part on its determination of the purpose of the 1904 Rosebud Act in finding the same purpose in the 1907 and 1910 Rosebud Acts. However, the relationship between the three Rosebud Acts is not "unique," as Bartlett suggests. The three Rosebud Acts were distinct statutes opening separate areas to settlement. Rosebud Sioux Tribe, 430 U.S. at 586. The

Court, as well as the parties, recognized that the three Acts, being substantially similar, would have had the same effect and must be viewed together in context. Rosebud Sioux Tribe, 430 U.S. at 606 nn. 29 and 30, 608-609, 612-613. See also, United States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977). The Court independently examined the circumstances of the 1907 and 1910 Acts, and verified that they were intended to have the same effect as the 1904 Act, which utilized language of cession. There is no reason why the 1908 Cheyenne River Act should not also be viewed in its historical context, which includes the other South Dakota Surplus Lands Acts passed during the same period.

2. Familiar Forces

It is suggested that the circumstances of the 1908 Act differ from those of the Rosebud Acts because the "familiar forces"

pressing for the opening of the Rosebud Reservation were not present with respect to the Cheyenne River and Standing Rock Reservations. This assertion is incorrect. To the contrary, the rush for Cheyenne River and Standing Rock lands was comparable to that at Rosebud:

> In 1909 some ten thousand claims became available on the Cheyenne River and Standing Rock reservations, opening to settlement Corson, Dewey, and Ziebach counties in South Dakota and the southern portion of Morton County in North Dakota. The registration was conducted during October at Aberdeen, Bismarck, LeBeau, Lemmon, Mobridge, and Pierre. There were 81,546 applications for claims . . . .

H.S. Schell, History of South Dakota, 255 (2d ed. 1968). See also, Rosebud Sioux Tribe, 430 U.S. at 605-609.

3. Absence of a Cession Agreement

Any reliance on the absence of a formal agreement of cession between the United States

and the Tribes as evidence that the 1908 Act lacked intent to diminish the boundaries of the original reservation is misplaced. Such an agreement is not a sine qua non of disestablishment. Rosebud Sioux Tribe, 430 U.S. at 598 n.20.

The significance of agreements of cession is that where they are present, their contents may be indicative of congressional intent. "The underlying premise is that congressional intent will control." Rosebud Sioux Tribe, 430 U.S. at 586. There is nothing in the circumstances of the 1908 Act to suggest that Congress desired to effect diminishment of the boundaries of the original reservation only if the Tribe had formally agreed to a cession of the territory in question.

To the contrary, quite a different position is clear from a review of the actions taken by Congress with respect to the

1908 Act. In view of Congress' understanding of its authority after 1903, in the wake of Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), it is not surprising that Inspector McLaughlin was sent to the Cheyenne River and Standing Rock Reservations not to negotiate an agreement, but only to ascertain the views of the Indians as to the proposed legislation. While, by 1907, McLaughlin was still negotiating an informal cession, this was not incorporated within the text of the 1907 Rosebud Act. By 1908, Congress had dispensed with even the informal cession agreement, although councils with the Indians remained as part of the process. The same process, as one would expect, was thereafter followed by McLaughlin at Rosebud and Pine Ridge in 1909 and 1910.

Finally, the discussions between McLaughlin and the Indians at both reservations demonstrate the clear understanding of

everyone present that the proposed opening, whatever form it might take, would result in a change in reservation boundaries. See Pet. Br. App. A58-A59, A62, A68, A76, A80, A84, A85, A87-A90, A93, A95-100, A102-A104, A106, A110-A112, A113-A115, A118, A120-A121, A131-A132, A134, A135, A143, A144, A152.

When the 1908 legislation was considered by Congress, there is nothing in the legislative history to indicate that the presence or absence of an agreement was thought to be critical to the effect of the opening. There is every reason to believe that Congress, as it did in the case of the Rosebud Indians, intended the disestablishment of the opened area regardless of formal consent by the Indians.

C. The Subsequent History Supports Diminishment

The jurisdictional history of the affected areas demonstrates that federal and state courts operated for six decades under

the assumption that those areas were no longer a part of the reservation, following the decision of the District Court in United States v. La Plant, 200 F. 92 (D.S.D. 1911). Contrary to the claim made by Bartlett, the importance of La Plant lies not so much in its precedential value, but in the fact that it establishes the operating assumption concerning jurisdiction in this area in the years following the opening. See, Rosebud Sioux Tribe, 430 U.S. at 603.

From 1911 to at least 1972, based on the operating assumption set out in LaPlant, the State exercised civil and criminal jurisdiction over unallotted lands in the opened area. United States v. Dupris, 612 F.2d at 338-339 (McMillian, J., dissenting); United States v. A Juvenile, 453 F. Supp. at 1199-1200. It is not true, as Bartlett claims, that the State's exercise of jurisdiction was

limited to those matters involving only non-Indians. See also, United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973) (1965 state conviction of Indian); United States ex rel. Miner v. Erickson, 428 F.2d 623 (8th Cir. 1970) (1962 state conviction of Indian); Lafferty v. State ex rel. Jameson, 80 S.D. 411, 125 N.W.2d 171 (1963) (1960 state conviction of Indian); State v. Sauter, 48 S.D. 409, 205 N.W.25 (1925) (pre-1925 state conviction of non-Indian for murder of Indians). The long-standing exercise of jurisdiction by the State, together with the repeated decisions of the state Supreme Court confirming such jurisdiction, should be accorded substantial weight. Bartlett suggests that the State's exercise of criminal jurisdiction may not have been premised on disestablishment but rather on a 1929 Act purporting to reserve to the State

criminal jurisdiction over reservations. This statute has never been discussed in any State Supreme Court opinion, and the Attorney General determined in 1940 that the Act was invalid. 1939-1940 Attorney General's Opinions, p. 505. There is no evidence that the statute was ever relied upon, and in fact the State was exercising jurisdiction over the area in question long before its adoption. See, Sauter, supra at 28 (fifteen years after the opening, the state Supreme Court held that the 1908 Act had "chang[ed] the boundary" of the original Cheyenne River Reservation.)

The fact that the United States and the Tribe have also exercised limited jurisdiction in the opened area is not particularly significant. There is no question that both the Tribe and the United States had jurisdiction over trust allotments in the general

area and Indians residing on those allotments, and other lands reserved from disposal for tribal use. DeCoteau, 420 U.S. at 446. In addition, the federal government would retain administrative authority over surplus lands until they were entered by homesteaders, by virtue of their status as sales agent and trustee for the Tribe with respect to the proceeds of the lands. See, Ash Sheep Co. v. United States, 252 U.S. 159, 164-166 (1920). The United States, as guardian for the welfare of tribal Indians, also provides economic and educational benefits outside reservations as well as within their boundaries. See, Rosebud Sioux Tribe, 430 U.S. at 661 n.49. These factors, however, are not illuminating on the question of reservation status. Juvenile, 453 F.Supp. at 1176, 1199-1201.

Two pieces of federal legislation in regard to the area opened by the 1908 Act

also support a finding that the Act diminished the boundaries of the original Cheyenne River Reservation. One of these pieces of legislation was the 1910 liquor amendment, which is discussed in detail in this brief and in the State's initial brief.

The second piece of legislation involved the opening of the portion of the original Cheyenne River Reservation not opened by the 1908 Act. Although this proposal was never enacted, it clearly reflects the contemporary understanding of the 1908 Act.

Senator Gamble introduced S. 3285 in 1909. When the bill was reported out of the Senate Committee on Indian Affairs, some official correspondence was attached to the report. S.Rep. No. 518, 61st Cong., 2nd Sess. (1910). One of the pieces of correspondence was a letter from R.A. Ballinger, Secretary of the Interior, to Moses E. Clapp,

Chairman of the Senate Committee on Indian Affairs. In that letter, Secretary Ballinger states (emphasis added):

> The lands described in Section 1 of the bill comprise all of the Cheyenne River Reservation . . . .

S.Rep. No. 518, supra at 4. The Report itself also states that "the area proposed to be opened is 1,209,600 acres." Id. at 2. Based on the acreage figures set forth in earlier arguments, this figure could not include either the allotted or the unallotted land in the area affected by the 1908 Act. Therefore, in 1910, the Senate Committee on Indian Affairs clearly considered the reservation to be that geographical area which was not included in section 1 of the 1908 Act. See, Juvenile, 453 F.Supp. at 1196.

III. The "Immediate and Irrevocable Cession" Argument Raised by the United States is Totally Inconsistent with Prior Decisions of the Court, and is not a Proper Analysis for Diminishment Questions.

Ignoring the analysis outlined by this Court in Rosebud, the United States proposes an analysis which would turn the diminishment analysis set forth in Rosebud Sioux Tribe on its head. Although admitting the federal policy of the era was designed to "liquidate the Reservation system," the United States contends that this policy was intended to be immediately effectuated only in cases of outright cession of land from the Tribe to the United States in return for a sum certain payment. In all other instances, it is argued, disestablishment would possibly occur only at such time as the opened area "was entirely--or almost entirely--sold off to non-Indian settlers" before the practice of surplus land sales was halted by the Indian Reorganization Act of 1934.

The above analysis, however, is wholly inconsistent with Rosebud Sioux Tribe, DeCoteau, and Mattz v. Arnett, 412 U.S. 481

(1973). Although the United States urges the Court to re-affirm the standards set in the controlling decisions of this Court dealing with diminishment questions, its analysis is directly at odds with the standards set in those decisions.

Instead of focusing on congressional intent by examining each statute and its history, the courts, according to the United States, are to focus on subsequent extrinsic developments in order to ascertain the effect of a particular statute. The United States proposes that, without resort to the legislative history, one must presume that all non-cession opening statutes necessarily had the same legislative intent--the future but conditional disestablishment of the reservation area involved. Rather than examine the text of the Act and its legislative history for indications of congressional intent, the United States suggests that one review what

"Congress would have wished" in light of subsequent developments.

A fundamental problem with the analysis proposed by the United States is that it lacks any historical foundation. There is no evidence that Congress intended the effect of any opening--let alone all--to have a delayed disestablishment effect conditioned on the complete sale of the opened lands. For example, despite the uncertain-sum aspect of the payment scheme, the text of the 1904 Rosebud Act indicated that it had immediate disestablishment effect. Rosebud Sioux Tribe, 430 U.S. at 596 n. 18.

The analysis urged by the United States is therefore wholly artificial. The presence of cession agreements and sum-certain payments are factors which are not dispositive of the question of disestablishment. They are, in fact, only two of many possible

factors to be considered. Rosebud Sioux Tribe, 430 U.S. at 598 n. 20.

The reliance of the United States on the Tribes' retention of an interest in unsold opened lands to support its method of analysis is also unfounded. Although the Indians retained an interest in the surplus lands by virtue of their right to the sale proceeds, it does not follow that the lands were still part of an Indian reservation. As this Court noted:

> "[T]he fact that a beneficial interest is retained does not erode the scope and effect of the cession made, or preserve to the reservation its original size, shape, and boundaries." The question of whether lands become "public lands" under Hitchcock and Ash Sheep, is therefore, logically separate from a question of disestablishment.

Rosebud Sioux Tribe, 430 U.S. at 601, n. 24 (citations omitted).

Further, the Indians' right of occupancy was not merely "suspended." In the case of

the 1908 Act at issue, the Tribe had no "right to resume occupancy" where lands were not sold. There is no provision for reversion to the Tribe, and none was made until the Indian Reorganization Act of 1934, which provided that the Secretary of Interior was authorized to "restore to tribal ownership" any unsold surplus lands. 25 U.S.C. § 463. If the lands had been owned by the Tribes all along, then there certainly would have been no need for Congress to restore them to tribal ownership.

Even if the Court were to adopt the analysis suggested by the United States, it is not at all clear in which category the 1908 Cheyenne River Act would fit. Of the 1.1 million acres to be disposed of at Cheyenne River, only 28,000, or less than 3%, remained vacant after fifteen years. Ultimately, all but 15% of the acreage was sold to non-Indians. This remainder was returned

to the Tribe. These figures illustrate the impracticality of the diminishment analysis suggested by the United States as to the ultimate determination of the time when diminishment of the original reservation boundaries might take place.

The United States concedes that a complete sale of all lands is not required, and asserts that diminishment may be found when the area is "almost entirely" sold. But at what point is this criteria met? Is there a "magic number" of acres that must be sold?

The United States suggests that diminishment may be justified if the character of the land and the population is sufficiently non-Indian. Br. U.S. 20-21. This view ignores two important facts. First, in the case of most surplus lands acts, regardless of whether they involved agreements of cession, Indians were allowed to take allotments in the general area, resulting in a significant

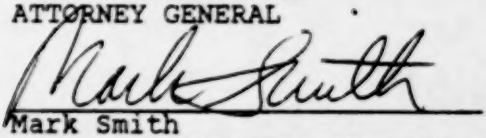
Indian presence and land base even in areas clearly disestablished. See, DeCoteau, 420 U.S. at 428. Second, even where all surplus lands were sold, Tribes have, in many cases, reacquired substantial land holdings. Therefore, the quantum of Indian presence on land ownership in an opened area cannot be used as a reliable standard against which congressional intent should be measured.

CONCLUSION

Petitioners Solem and Meierhenry respectfully request that this Court reverse the decision of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

MARK V. MEIERHENRY
ATTORNEY GENERAL



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